

ACTIVE POST-SENTENCING SEARCH & INVESTIGATIVE MEASURES VIS-À-VIS CONVICTED FUGITIVES?

1959 European Convention on mutual assistance in criminal matters

Article 1

1. The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the **widest measure** of mutual assistance in proceedings in respect of offences the **punishment** of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.
2. This Convention **does not apply to arrests, the enforcement of verdicts** or offences under military law which are not offences under ordinary criminal law.

1978 Additional Protocol

Article 3

The Convention shall also apply to:

- a. the **service of documents** concerning the enforcement of a sentence, the recovery of a fine or the payment of costs of proceedings;
- b. measures relating to the suspension of pronouncement of a sentence or of its enforcement, to conditional release, to deferment of the commencement of the enforcement of a sentence or to the interruption of such enforcement.

PM 1: Article 3 a and b are mirrored in Article 49 e) respectively f) of the **SIC** (supra)

PM 2: **2000 EU MLA Convention** does not alter the above

Assessment

The convention, as amended by the Protocol, not only covers those forms explicitly mentioned in the convention (or in a supplementing legal instrument), which essentially are mere investigation-related, but also every other kind of MLA (in which case there is an undertaking to afford only, though), including even in the post-sentencing phase (such as assistance relating to application for review of the sentence or to proceedings for the compensation of persons found innocent, service of documents related to enforcement or measures relating to suspension, deferment, interruption, termination of enforcement), be it never for the actual purpose of execution or enforcement of sentences (explicitly excluded)

Specific legal instruments exist allowing for transfer of execution (mutual recognition) of sentences

Conclusion: No legal basis for cross-border post-sentencing investigative measures aimed at tracing fugitives

1997 Naples II Convention (mutual assistance in cooperation between customs authorities)

hot pursuit, cross-border surveillance, covert investigations, joint special investigation teams, surveillance/special watch: all limited to the prevention, (detection), investigation or prosecution of (planned or committed) infringements

Conclusion: No legal basis for investigative measures or cooperation in the post-sentencing phase

2006 Swedish Framework Decision

Scope limited to exchange of information and intelligence for the purpose of conducting pre-trial criminal investigations or criminal intelligence operations not yet having reached the stage of a criminal investigation

Conclusion: No legal basis for cooperation in the post-sentencing phase

2005 Prüm Convention and 2008 Prüm Decision (introducing the essential Prüm *acquis* on the level of the EU27)

DNA

Reference data: only for the investigation of offences

Further personal data: requires MLA (the scope of which is also limited – supra)

Fingerprint and vehicle registration data: for the prevention and investigation of offences

Prevention of terrorism

Joint operations: only of authorities competent for monitoring public order, security or the prevention of criminal offences

Conclusion: No legal basis for cooperation in the post-sentencing phase

2004 Benelux Convention on cross-border police intervention

Article 18 – cross-border hot pursuit

broadens the scope of Article 41 1990 SIC: none of the traditional limitations, right to arrest, also pursuit through air, over sea or water, and: in conformity with national law [unspecified: of both states involved?] of persons who [by escaping] have avoided the enforcement of a penalty involving deprivation of liberty [unauthentic, free translation]

Limited added value:

- Benelux only

- uncertainty about national law of the states concerned (especially if broadened to EU and left to full discretion of MS)
- immediacy required in case of hot pursuit (rendering the measure unfit therefore for 'search' purposes in ENFAST context)

Article 19 – cross-border surveillance

broadens the scope of Article 40 paragraph 1 (i.e. observation following request and authorisation only) 1990 SIC: extended, in conformity with national law [unspecified: of both states involved?] to persons who [by escaping] have avoided the enforcement of a penalty involving deprivation of liberty, incurred for having committed an extraditable criminal offence, and to persons who may lead to the detection of the latter persons [unauthentic, free translation]

Limited added value:

- Benelux only
- uncertainty about national law of the states concerned (especially if broadened to EU and left to full discretion of MS)
- 'extraditable' criminal offence (made sense in the pre-EAW-era; currently difficult to assess, since extradition has been repealed and replaced with surrender) [side remark: this is a persistent problem, due to absence of coordinated legal drafting control mechanism at EU level]
- extension only relates to surveillance following request and authorisation by judicial authorities (not to urgent surveillance)
- allows only for cross-border continuation of the surveillance of such persons (required therefore that these are already kept under surveillance in the requesting MS; which clearly is not the case for fugitives, so that the entire extension seems pointless for ENFAST-purposes but for 'persons who may lead to the detection of' fugitives)

Article 2 – Goal

to extend the possibilities of police cooperation in the context of [...] the prevention and investigation of criminal offences (not: execution of sentences relating to criminal offences; just another legal drafting inconsistency ...)

Conclusion: potential (because entirely dependent on domestic law of the states involved), regional (Benelux) and disputable (because contradicted by the general orientation of the Convention on prevention and investigation of offences) legal basis for the continuation across borders of the surveillance of persons (i.e. if already under surveillance in the requesting state) who may lead to the detection of fugitives, in case it is anticipated timely that a border may be crossed (prior authorisation by the requested state following an MLA request is required) only (slightly more than zero)